

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH A. AND ANNE G. CURCIO	:	DETERMINATION
	:	DTA NO. 818849
for Redetermination of a Deficiency or for Refund	:	
of New York State and New York City Personal	:	
Income Taxes under Article 22 of the Tax Law and	:	
the Administrative Code of the City of New York	:	
for the Years 1997 and 1998.	:	

Petitioners, Joseph A. and Anne G. Curcio, 164-34 87th Street, Howard Beach, New York 11414, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1997 and 1998.

On July 2, 2002 and July 9, 2002, respectively, petitioners, appearing by Kestenbaum and Mark, Esqs. (Bernard S. Mark, Esq. and Karen J. Tenanbaum, Esq., of counsel), and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by December 6, 2002, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners, shareholders of an S corporation, are entitled to a modification excluding school bus income from the Federal adjusted gross income reported on their personal

income tax returns, based upon and in the same manner as such modification is allowed to a corporation in calculating its entire net income per Tax Law, article 9-A, § 208(9)(a)(4).

FINDINGS OF FACT

1. Petitioners, Joseph A. and Anne G. Curcio, are residents of New York and are shareholders of a New York State Subchapter S corporation engaged in the school bus transportation business. Petitioners filed a New York State and City of New York Resident Income Tax Return (Form IT-201) for each of the years 1997 and 1998. On each of these returns, petitioners modified their Federal adjusted gross income by subtracting, at line “28”, the amounts \$334,109.00 for 1997 and \$1,750,199.00 for 1998. This subtraction modification was for “income related to school bus operations.”

2. The Division of Taxation (“Division”) disallowed petitioner’s subtraction modification for each year, taking the position that while the subtraction is allowable for corporation franchise tax purposes, it is not an allowable subtraction for personal income tax purposes. The Division’s disallowance and resulting calculation of additional tax due in the amount of \$39,038.16 for 1997 was reflected on a Statement of Proposed Audit Changes issued to petitioners on May 15, 2000. The Division’s disallowance and resulting calculation of additional tax due in the amount of \$198,294.05 for 1998 was reflected on a Notice of Deficiency issued to petitioners on October 23, 2000.

3. Petitioners paid the taxes asserted as due on the statement (for 1997) and the notice (for 1998). Thereafter, on December 28, 2000, petitioners filed a Claim for Credit or Refund of Personal Income Tax (Form IT-113-X) for each of the years, stating the reason for their claims as follows:

Claim is based on the school bus income exclusion and how it pertains to a shareholder of a NYS “S” corporation. This claim is based on research

indicating the statutes advise that S-1, which is the allowable subtraction for this item does allow this for an S. Corp and that no where does it specifically state that it is not a flow-through item.

4. The Division issued a Notice of Disallowance of petitioners' claims for refund on February 2, 2001, as follows:

The New York subtraction from income for school bus receipts has been disallowed on your 1997 and 1998 New York State income tax returns since it is not specifically authorized under Section 612 of the New York State Tax Law.

The subtraction for school bus receipts is allowed when computing income for a Sub-S Corporation under Article 9-A of the New York State Tax Law. It is not an allowable subtraction modification under Section 612(c) or any other section under Article 22 of the New York State Tax Law.

CONCLUSIONS OF LAW

A. Tax Law § 208(9)(a) and (b) enumerate certain specified subtractions from and additions to the Federal taxable income of a corporation, including an S corporation, in arriving at the corporation's entire net income for purposes of the franchise tax imposed under Tax Law Article 9-A. Relevant to this matter is Tax Law § 208(9)(a)(4), which allows a corporation to exclude income from school bus operations in calculating its entire net income. There is no dispute as to the dollar amounts of such exclusion for each of the years in question, or that petitioners' S corporation was entitled to this exclusion for each of such years in arriving at its entire net income under Article 9-A.

B. Not all corporate items of income, gain, loss and deduction are treated identically for Federal and New York State purposes. As is detailed above, Article 9-A provides a specific modification reducing the Federal taxable income of a corporation, including an S corporation, by the amount of its income from school bus operations. Petitioners, as electing shareholders of an S corporation pursuant to Tax Law § 660, are subject to personal income tax under Tax Law

Article 22 on the pro rata share of their S corporation's Federal items of income, gain, loss and deduction passed through to them and included in their Federal adjusted gross income. Tax Law § 617 governs the taxability of such S corporation's pass through items of income, gain, loss and deduction. Pursuant to section 617, in computing a taxpayer's New York adjusted gross income and taxable income, the S corporation's pass-through items included in a shareholding taxpayer's Federal adjusted gross income are to be modified, pursuant to Tax Law § 612, in the same ways applicable to all items of income, gain, loss and deduction included in Federal adjusted gross income, whether or not derived from an S corporation.

C. Tax Law § 612(c), in turn, enumerates the subtraction modifications serving to reduce a taxpayer's Federal adjusted gross income including, pursuant to Tax Law § 617, the pro rata share of items from S corporations included in the taxpayer's Federal adjusted gross income. Such modifications, like deductions and credits, constitute exemptions from taxation, and a taxpayer must be able to point to some express provision of law clearly allowing the same (*see, Matter of Golden v. Tully*, 88 AD2d 1058, 452 NYS2d 748, *affd* 58 NY2d 1047, 462 NYS2d 626; *Matter of Grace v. State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715).

D. There is no provision in Tax Law § 612(c), or elsewhere in Article 22, which provides for a modification reducing the Federal adjusted gross income of an S corporation's shareholder by the amount of that shareholder's pro rata share of the S corporation's school bus income. Thus, petitioners incorrectly modified their Federal adjusted gross income (the starting point in calculating New York adjusted gross income) for each of the years in issue by subtracting school bus income therefrom. It is true that at the Article 9-A level, an S corporation's Federal taxable income is reduced because the corporation's school bus income is specifically modified out, per the Tax Law § 208(9)(a)(4) exclusion, to arrive at Article 9-A entire net income. In contrast,

however, at the personal income tax level, the corporation's Federal taxable income as passed through (pro rata) to the shareholders may not be reduced by school bus income included therein because there is no specific provision modifying such income out of the shareholder's Federal adjusted gross income. Accordingly, the Division properly disallowed the requested refunds premised on petitioners' claim of such a modification for each of the years in issue (*see, Matter of Cohen*, Tax Appeals Tribunal, October 11, 1990).

E. Petitioners argue the "character" of the corporation's income being passed through (i.e., school bus income of an S corporation excludable at the corporate level) requires exclusion of the same income at the personal income tax level based on consistency. This argument misapprehends and overlooks the fact that it is the items of income, gain, loss and deduction comprising the corporation's Federal taxable income, as opposed to its Article 9-A entire net income, which pass through, pro rata, to the S corporation's shareholders. Finally, neither the existence of the school bus income exclusion modification in Article 9-A, nor the absence of a specific statutory provision in Article 22 precluding such a modification at the personal income tax level, means that such a modification may (or should) be "read in" for purposes of Article 22. To the contrary, the omission of a school bus income subtraction (or exclusion) modification from Article 22 must be considered deliberate. In fact, the personal income tax itself contains no provision allowing individuals operating sole proprietorships which generate school bus income the benefit of such a modification. There would seem to be no reason then to allow such a modification to S corporation shareholders on their personal income tax returns, but not to sole

proprietors, given the comparative inequity which would result among similarly situated taxpayers.¹

F. The petition of Joseph A. and Anne G. Curcio is hereby denied, and the Division's Notice of Disallowance of petitioners' refund claims for the years 1997 and 1998, dated February 2, 2001, is sustained.

DATED: Troy, New York
April 10, 2003

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

¹ As the Division notes, corporations which desire the benefit of the school bus income exclusion should not make the New York S election under Tax Law § 660. Under such circumstances, the corporation paying tax under Article 9-A will gain the benefit of the Tax Law article 9-A, § 208(9)(a)(4) exclusion and the shareholders will not (as in the case of an S corporation) be taxed directly on the corporation's income.